IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 11503 of 1994

For Approval and Signature:

HON'BLE MR.JUSTICE AKIL KURESHI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

DAVIDAS MADHUKAR

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 11503 of 1994

MR IS SUPEHIA for Petitioner No. 1

MR ND GOHIL, ASSTT.GOVERNMENT PLEADER for Respondent No. 1-2

CORAM : HON'BLE MR.JUSTICE AKIL KURESHI

Date of decision: 06/09/2004

ORAL JUDGEMENT

In the present petition, the petitioner has challenged the order dated 27.1.1992, passed by the Disciplinary Authority, by which the petitioner was

ordered to be removed from service. The petitioner has also challenged the orders passed by the Appellate Authority dated 7.5.1992 and the Revision Authority dated 7th August, 1993, by which the order of the Disciplinary Authority was confirmed.

2. The petitioner who was at the relevant time working as a Police Constable was issued a charge-sheet dated 31.5.1989, alleging inter-alia that on 21.6.1988, while the petitioner was discharging his duties as a lock-up guard in City Policy Station of Baroda, out of two accused persons in the lock-up, one Nazirkhan Pathan complained that he has to come out of the lock-up to answer to the nature's call. It is further alleged that though the petitioner was alone in the Police Station at that time and guard commander and other two Police Constables were also absent, the petitioner without informing the Police Station officer or without taking help of any other Constable, opened the lock up and took the said accused to the toilet without handcuffing and did not bolt the door of the toilet from outside, nor did he keep proper vigilance and as a result of this negligence of the petitioner, said accused Nazirkhan Pathan escaped from the lock-up. Since the petitioner denied the charges, a full-fledged Departmental enquiry was conducted, pursuant to which the enquiry officer on 31.5.1989, submitted the report and concluded that the charges against the petitioner are proved. The Disciplinary Authority therefore, issued a show cause notice dated 24.9.1991, supplied a copy of the enquiry officer's report to the petitioner and called upon the petitioner to show cause why he should not be dismissed from service. After considering the representation of the petitioner dated 31st October, 1991, the Disciplinary Authority by its impugned order dated 27.1.1992 was pleased to order that the petitioner be removed from service. The petitioner appealed against the said order without success and his revision petition also came to be rejected.

3. Appearing for the petitioner learned Advocate Mr. I.S. Supehia has assailed the orders passed by the authorities below on several grounds. Before outlining the grounds of challenge, it may be noted at the out-set that the learned Advocate for the petitioner has not disputed the findings arrived at by the Disciplinary Authority. There is no contest to the fact that the incident as alleged has in fact taken place. The learned Counsel for the petitioner has not challenged any of the findings of fact arrived at by the Disciplinary Authority while accepting the enquiry officers' report. The

learned Advocate for the petitioner however, has sought to challenge the impugned order on the following grounds:-

1. It is the case of the petitioner that the charge-sheet dated 31.5.1989 is illegal as the same alleges that the petitioner failed to hand-cuff the accused or to lock the door from outside. The learned Advocate for the petitioner contents that hand-cuffing of an accused when taken to toilet is not permissible in view of the decision of this Court in the case of R.P. Vaghela V. State of Gujarat, reported in 2002 (1) GLR p.886. He also contents that in view of the provisions of Police Manual, it is not permissible to bolt the door from outside when the accused person is inside the toilet.

2. The learned Counsel for the petitioner also contended that the petitioner was acquitted in the criminal case and that therefore, the employer in the Departmental enquiry could not have come to different findings than those arrived at by the Criminal Court. He placed reliance on the decision of the Supreme Court in the case of Capt. M. Paul Anthony Vs. Bharat Gold Mines Ltd. & anr. reported in (1999) 3 SCC p.679.

3. The next ground of challenge raised by the petitioner is that the petitioner did not have any help in form of other Constables, and absence of other Constables should not be utilised against the petitioner to punish him for any act or omission.

4. The petitioner has also contended that the penalty of removal is excessive and not commensurate with the misconduct alleged. He submits that at best it was a case of negligence and failure to perform the duty with skill, and that by itself would not amount to misconduct and that too not such a serious misconduct as to warrant extreme penalty of removal from service. In support of this contention, he relies on the decision of this Court in Mohanbhai Dungarbhai Parmar V. Y.B. Zala & anr., reported in 20 GLR 497 as well as unreported decision dated 13th August, 2004, passed in Special Civil Application No. 6260 of 2001 as well as yet another unreported decision dated 12th September, 2000,

passed by the Division Bench in Letters Patent Appeal No. 349 of 1991 with Letters Patent Appeal No. 516 of 1993. He also relies on the Police Manual wherein instructions have been issued regarding the suitability of awarding particular penalty. Relying on para 449 (5) of the Bombay Police Manual 1959, Volume I, he submits that the Disciplinary Authority ought to have taken into account all the relevant aspects of the matter before awarding extreme penalty of removal from service. According to him, since in the present case the Disciplinary Authority has not applied its mind to all relevant aspects of the matter, the order of penalty is illegal and is required to be set aside. He also contents that the penalty being excessive should be ordered to be reduced.

4. Appearing for the respondent, learned AGP Mr. Gohil supported the impugned orders. He submits that the Departmental enquiry has been conducted in consonance with the principles of natural justice and the misconduct proved against the petitioner being serious, no interference is called for.

5. I have considered the material placed on record and the rival submissions made on behalf of the parties.

5.1 As pointed out earlier, there is absolutely no denial of the fact that the incident as alleged did actually took place. In fact, the respondents had during the course of the enquiry examined the very accused who had managed to give a slip to the petitioner on the fateful day. Said accused Nazirkhan Pathan had in his deposition clearly stated that he had falsely complained about the stomach ailment. He has also stated that after permitting him to go to the bathroom, the petitioner was standing with his back facing the door and taking advantage of this, he had run away.

5.2 The petitioner has also not raised any grounds with respect to the legality of the Departmental enquiry conducted, no beach of procedure or principles of natural justice has been urged or established.

5.3 In this background, if one examines the contentions raised by the petitioner, the first issue raised is that the charge-sheet is illegal since it alleges that the petitioner did not hand-cuff the accused nor did he bolt the toilet from outside. The learned Counsel for the petitioner placing reliance on the

decision of Full Bench in R.P. Vaghela Vs. State of Gujarat (supra) has contended that hand-cuffing was illegal and not permitted. Even though I agree with the contention of the petitioner that the accused could not have been hand-cuffed, nor may be the door could have been bolted from outside, the charge-sheet is not based on these two factors only. In the charge-sheet it is clearly stated that neither the petitioner had bolted the toilet from outside, nor had he kept sufficient vigilance which negligence permitted the accused to run away. In the essence therefore, the charge against the petitioner is of having exhibited gross negligence which enabled an accused person to escape from the Police lock-up. The charge-sheet therefore, cannot be declared as illegal as suggested by the petitioner's counsel.

5.4 The learned Counsel for the petitioner has heavily relied on the decision of the Criminal Court while acquitting the petitioner. To begin with, the charge-sheet against the petitioner in the criminal case was that by his conduct he had deliberately facilitated the escape of the accused. In light of that charge, the Criminal Court came to the conclusion that the petitioner is not guilty. The charge in the Departmental enquiry however, is entirely different and alleges an act of gross negligence on the part of the petitioner. The findings of the Criminal Court therefore, cannot be directly applied in the Departmental enquiry. The reliance placed by the learned Counsel for the petitioner on the decision of Capt. M. Paul Anthony (supra) is not acceptable in facts of the present case. In the above mentioned decision of the Hon'ble Supreme Court, it was found that the facts and evidence in both the proceedings, namely Departmental proceedings and the criminal case were the same and without there being any iota of difference, and in that view of the matter the Hon'ble Supreme Court found that distinction which is usually drawn as between the Departmental proceedings and the criminal case on the basis of approach and burden of proof, would not be applicable to that case.

5.5 In fact in the decision of the Hon'ble Supreme Court in the case of Chairman and Managing Director, United Commercial Bank & ors. V. P.C. Kakkar, reported in AIR 2003 SC 1571, it has been pleased to observe that acquittal in criminal case is not determinative of the commission of misconduct or otherwise and it is open to the authorities to proceed with the disciplinary proceedings notwithstanding the acquittal in criminal case. It per-se would not entitle the employee to claim immunity from the proceedings. At the most the factual

of acquittal may be a circumstance to be considered while awarding punishment. It would depend upon the facts of each case and even that cannot have universal application.

5.6 In the facts of the present case, I find that the charge in the criminal case is entirely different from one levelled against the petitioner in the Departmental enquiry. Since the petitioner has not challenged the findings arrived at by the Disciplinary Authority, mere fact that the criminal court found that the petitioner had not connived in the escape of the accused per-se would not absolve the petitioner from the proceedings of the Departmental enquiry.

5.7 The contention of the learned Counsel for the petitioner that there was not enough help from other Constables and therefore the accused escaped, also cannot be accepted. The petitioner had, at no point tried to seek help from any other Police Officer or await return of some other Constable to take the accused to the toilet. There is also no suggestion by the petitioner that the accused escaped despite his full vigilance and alertness. There is neither any suggestion nor any evidence of any scuffle, nor is the case that the petitioner was overpowered by the accused. It was a simple case wherein the petitioner was blissfully standing facing his back towards the door of the toilet and the accused escaped without any efforts whatsoever. The conduct of the petitioner is not only negligent, but is shocking for a Police Officer.

5.8 The last contention of the learned Counsel for the petitioner regarding quantum of penalty also cannot be accepted. Placing reliance on the decision of the Hon'ble Supreme Court in Union of India Vs. J. Ahmed, reported in AIR 1979 SC 1022, the learned Counsel has argued that at the best the petitioner can be said to have failed to perform his duties efficiently, but that by itself would not amount to serious misconduct. In view of the facts narrated above, I find that the petitioner had acted utterly negligently to facilitate escape of an accused. The petitioner had not taken any care whatsoever to prevent such an incident. Such conduct can be termed as gross negligence and dereliction of duty for a Police officer and cannot be tolerated under any circumstances.

5.9 I am unable to accept the contention of the learned Counsel for the petitioner that the authority had not applied its mind before imposing penalty of removal

from service. In the show cause notice dated 24.9.1991, the Disciplinary Authority had clearly mentioned that on earlier occasion when the petitioner was assigned duties at Raopura Police Station on 20.1.1978, the petitioner had without proper permission left the rifle receipt and the lock-up keys and gone away. These things were ultimately stolen. For this misconduct the petitioner was initially placed under suspension from 23.1.1979 to 15th September, 1979 and ultimately upon the charges being proved a penalty of reducing the petitioner to the minimum scale for a period of 2 years was imposed. In the said show cause notice it was also pointed out that the petitioner had remained unauthorisedly absent from 30th October, 1980 to 12th September, 1982, totalling to 684 days, for which misconduct the petitioner was ordered to be reduced to the minimum of scale. The notice further stated that despite chances being given to improve his conduct, the petitioner has once again demonstrated negligence in discharge of his duties. By the impugned order of 27.1.1992 also the Disciplinary Authority had noted that the petitioner in the past also had committed serious misconduct and he was given opportunity to improve his conduct to which he has failed and has once again exhibited gross negligence in discharge of his duties. Upon reading the show cause notice and the ultimate order of penalty, it is not possible for me to hold that the Disciplinary Authority has not applied its mind before awarding of penalty. The reliance placed by the learned Counsel for the petitioner on 20 GLR 497 is therefore, misplaced.

5.10 The contention of the learned Counsel for the petitioner that the Bombay Police Manual itself requires the Disciplinary Authority to take into account the general character of the officer and his past service also cannot help the petitioner in his challenge. As narrated above, the past service of the petitioner is also full of blemishes and despite being given opportunity to improve his conduct even after two serious misconducts, the petitioner has once again committed a grave misconduct which the Disciplinary Authority found would warrant an order of removal from service. For this reason, I do not find that the ratio of the decision of the Division Bench of this Court in order dated 12th September, 2000 in LPA No. 349 of 1991 would apply to the facts of this case.

5.11 In the decision dated 13th August, 2004 passed in Special Civil Application No. 6260 of 2001, it can be seen that this Court had set aside the penalty on the conclusion that there is total non-application of mind by

the Disciplinary Authority with respect to the quantum of punishment. For the reasons recorded above, I do not find that the Disciplinary Authority in the present case has not applied its mind to the relevant aspects of the matter before awarding the penalty. In fact, it is by now well settled that the Court or Tribunal should not interfere with quantum of punishment imposed by the employer unless the punishment shocks the conscience of the Court (see AIR 2003 SC 1571 - C.M.D United Commercial Bank V. P.C. Kakkar). The Hon'ble Supreme Court was pleased to hold that the Disciplinary Authority is the sole judge of facts and the High Court or the Tribunal while exercising the power of judicial review cannot normally substitute its own conclusion on the penalty imposed and impose some other penalty unless if the punishment imposed by the Disciplinary Authority shocks the conscience of the Tribunal or it would appropriately mould the relief either directing the Disciplinary Authority to reconsider the penalty imposed or it may in exceptional and rare cases impose appropriate punishment with cogent reasons in support thereof.

5.12 In the decision reported in AIR 2003 SC 1462 Regional Manager, U.P.S.R.T.C Etawah and ors. Vs. Hoti Lal and anr. the Hon'ble Supreme Court has observed that the Court or Tribunal while dealing with the quantum of punishment has to record reasons as to why it is felt that the punishment does not commensurate with the proved charges. The scope for interference is very limited and restricted to exceptional cases.

6. In the present case, I find that the petitioner was held to have committed serious misconduct of gross negligence whereby a person who was accused in criminal case was allowed to escape from the Police lock-up. As a Police Constable this would be a very serious lapse on the part of the petitioner. In the past also on two occasions the petitioner was proved to have committed serious misconduct. When the Disciplinary Authority having regard to the facts of the case and also having regard to the past conduct of the petitioner has chosen to impose a penalty of removal from service, it is not possible for this Court to come to a conclusion that the penalty imposed is not commensurate with the proved charges and the attending circumstances.

7. In the result, I do not find any merit in the petition and the same is therefore, rejected. Rule is discharged with no order as to costs.

8. The learned Counsel for the petitioner at this

stage states that the petitioner though entitled, has not so far approached the Government for grant of compassionate pension in view of pendency of this litigation. Without expressing my opinion on the entitlement of the petitioner to receive any such pension, it will be open for the petitioner to make a representation to the respondents and I am sure that the respondents will consider the same in accordance with law.

(Akil Kureshi, J.)
*/Mohandas